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No. 00-1293

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICI CURIAE* OF MORALITY IN MEDIA, INC., FAMILY RESEARCH COUNCIL, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTISTS CONVENTION *IN SUPPORT OF PETITIONER*

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INTEREST OF *AMICI CURIAE*

Morality in Media, Inc., the Family Research Council and the Ethics & Religious Liberty Commission of the Southern Baptists Convention as *amici curiae*,[1] file this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record Paul J. McGeady and Co-Counsel Robin S. Whitehead of Morality in Media, Inc., with contribution by Co-Counsel Janet M. LaRue of the Family Research Council and Co-Counsel Shannon Royce of the Ethics & Religious Liberty Commission of the Southern Baptists Convention. No part of the brief was authored by any attorney for a party. No person or entity other than these *amici* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 notes 7 and 8 (1973).

Morality in Media has an interest in this case because it specializes in providing assistance on issues related to the laws of obscenity, child pornography, broadcast indecency, and the display and dissemination of materials that are harmful to minors. Morality in Media and the American Catholic Lawyers Association filed a brief in the Third Circuit below as *amici curiae* in support of the government's position.

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001); and *Ashcroft v. Free Speech Coalition*, No. 00-795 (2001); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, No. 00-799 (2001).

Family Research Council, Inc. (FRC) is a non-profit, research, and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, academic community, business leaders, and general public about family and religious liberty issues that affect the nation. FRC is committed to ensuring that the legacy of

family, faith and freedom is not forgotten in America. FRC endorses parental involvement and parental choice in education and works to reduce the federal government's intrusion into local schools, including private and religious schools. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. Kenneth L. Connor is the President and Janet M. LaRue is the Senior Director of Legal Studies.

The Ethics & Religious Liberty Commission has an interest in this case as it is the moral concern and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with 16 million members in over 41,000 autonomous local churches. The Commission is charged with addressing public policies affecting the sanctity of human life, morality and religious liberty.

Amici are filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

The Third Circuit's holding that the Child Online Protection Act's ("COPA") definition of "harmful to minors" requires a geographic standard as the measure of what constitutes the community signifies a misunderstanding of the concept of "contemporary community standards."

If left uncorrected by this Court, this misunderstanding could result in the invalidation of the obscenity laws (at least in the Third Circuit) as applied to the World Wide Web. It also conflicts with the decision in *Reno v. ACLU*, 521 U.S. 844 at 878 n.44 (1997), where this Court specifically recognized that federal obscenity laws apply to the Internet stating that "Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles."

Further, *amici* intend to demonstrate that there are narrowly limited classes of speech that are unprotected by the First Amendment, one of which is "nuisance speech." *Amici* submit that material "harmful to minors" transmitted by means of the Internet, intrudes into the privacy of the home and is readily accessible to children, is a form of "nuisance," and as such need not meet the community standards prongs of *Miller* or *Ginsberg*.

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN ITS HOLDING THAT THE "HARMFUL TO MINORS" DEFINITION REQUIRES A "GEOGRAPHIC" STANDARD AS THE MEASURE OF WHAT CONSTITUTES THE "COMMUNITY STANDARD"

COPA's definition of material that is "harmful to minors" combines both the *Miller v. California* test for what is obscene for adults, as well as the definition of what is obscene for minors, found in *Ginsberg v. New York*.[2]

The Court of Appeals' determination that COPA "imposes an overreaching burden and restriction on constitutionally protected speech," *ACLU v. Reno*, 217 F.3d 162, 176 (3rd Cir. 2000), was based on their incorrect First Amendment analysis of "COPA's reliance on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." *Id.* at 173. The Court reasoned that:

> Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. 217 F.3d at 166.

[2] Compare 47 U.S.C. 231(e)(6) with *Miller*, 413 U.S. 15, 24 (1973) and *Ginsberg*, 390 U.S. 629, 632-633 (1968).

This rationale signifies a misunderstanding of the concept of "contemporary community standards." In order to understand the concept of "contemporary community standards," it is vital to look at the seminal case of *Miller v. California*, 413 U.S. 15 (1973), where both the definition of, and the test for, obscenity are found as currently applied in federal and state courts throughout the United States.[3]

The definition of obscenity is the essence of what will be deemed to be obscene. It does not contain any element of community standards. As stated in *Miller* at 413 U.S. at 24 the definition reads:

> Works which, taken as a whole appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value.

Miller then provides the test for determining whether something is obscene:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* [Emphasis added.][4]

The *Miller* Court goes on to explain the concepts of "average person" and "contemporary community standards" as used in the test for obscenity (and not its definition) at 423 U.S. at 33-34:

> As the Court made clear in *Mishkin v. New York*, 383 U.S., at 508-509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one.

This Court's concern in establishing this test was to insure that the juror be directed not to apply his or her own

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[3] *Amici* note that this Court in *Roth v. United States*, 354 U.S. 476 (1957), first approved the concept of "contemporary community standards" to assist in obscenity determinations. The test at that time was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. More significant than the actual test in *Roth* (since the current test is that found in *Miller*) is the trial court's jury instruction on the community standard (with which the majority in *Roth* agreed):

> "[Y]ou determine its impact upon the average person in the community... You may ask yourselves does it offend the common conscience of the community by present-day standards." *Id.* at 490.

[4] *Amici* point out the distinction between the definition and the test of obscenity to show that the concept of "community standards" is not an element of the definition and therefore, *amici* submit that a person could arrive at the concept of "obscenity" as an abstraction even if he or she were to prescind from the community standards concept or for example used "reasonableness" in place of the community standards test. *See Hamling v. United States*, *infra*.

individual standard, but to seek the mean of the community for the obvious purpose of fairness to the defendant. The Supreme Court was not concerned with which particular "community standard" would be applied, as long as the jurors are instructed not to use their own personal standard, but instead to find a mean.

In *Hamling v. United States*, 418 U.S. 87 (1974), this Court discussed the concept of "contemporary community standard" and interpreted *Miller* to hold that no precise geographical area is a constitutional requirement for establishing the relevant community. The Court stated in *Hamling* at 104-105:

> *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene... But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of "the average person, applying contemporary community standards." *Id.*, at 24, 93 S.Ct., at 2615... A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law... Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a "statewide" standard did not mean that any such precise geographic area is required as a matter of constitutional law. [Emphasis added.]

Amici submit that it is impossible to read *Hamling* and conclude that the test for obscenity requires a geographic standard. Since the test under COPA, to determine whether material is harmful to minors, *viz.* obscene for minors, utilizes the same concept of community standards, as does the test for obscenity, it follows that COPA cannot be interpreted to require a geographic standard. The Third Circuit apparently so believed and is therefore in error.

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the same day that the Supreme Court decided *Hamling*, the Court further explained the "contemporary community standard" as set forth in *Miller*, when it reversed the trial court's conviction of defendant for the distribution of obscene material. The Court stated at 157:

> We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary

> community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*. [Emphasis added.]

In *Smith v. United States*, 431 U.S. 291 (1977), a case involving a conviction under the federal statute that proscribes the mailing of obscene materials, the Supreme Court was faced with deciding:

> Whether the jury's discretion to determine what appeals to the prurient interest and what is patently offensive is circumscribed in any way by a state statute such as s.725 of the Iowa Code. Put another way, we must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be.... *Id.* at 302.

Citing *Hamling*, the *Smith* Court reiterated its analogy between the function of "contemporary community standards" in obscenity cases, and "reasonableness" in other cases and stated at 302:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. *Hamling*, 418 U.S. at 104-105.

Smith further clarified that community standards are not an element of the obscenity crime, but with respect to the first two elements of the obscenity test, are to be used as a measure or reference point regarding what is accepted in the community from where the jury is drawn. The Court stated:

> Obviously, a state legislature would not be able to define contemporary community standards in a vacuum. Rather, community standards simply provide the measure against which the jury decides questions of appeal to prurient interest and patent offensiveness. *Id.*

Amici submit that "community standards" are required to be applied by the trier of fact in accordance with his or her own understanding of its meaning in his or her community. The Supreme Court has clearly held that the measuring by the trier of fact of these two elements against contemporary community standards does not mean that their discretion goes unchecked.[5]

[5] *See Hamling*, 418 U.S. at 114 and *Jenkins*, 418 U.S. at 160-161, where the Court emphasized that the second part of the *Miller* test relating to "patent offensiveness" contains a substantive component, in that the kinds of conduct that a jury would be permitted to label as "patently offensive," are the "hard core" types of conduct suggested by the examples given in *Miller*.

II. If the Court of Appeals Holding that "Community Standards" are to be Determined Only on a Geographic Basis as Applied to the World Wide Web is Affirmed, then Obscenity Laws Relating to the World Wide Web Would be Invalid

If the Third Circuit's determination that no geographic standards can be applied to material deemed obscene for minors on the World Wide Web is affirmed, then the obscenity laws relating to the Web would be presumptively invalid, not just the "harmful to minors" language of COPA. The court below stated at 217 F.3d 162, 180:

> We remain satisfied that *Miller's* "contemporary community standards" test continues to be a useful and viable tool in contexts *other than* the Internet and the Web under present technology... *Miller*, however, has no applicability to the Internet and the Web, where Web publishers are currently without the ability to control the geographic scope of the recipients of their communications.[6]

This finding by the court below directly conflicts with Supreme Court prior obscenity decisions,[7] including *Reno v.*

[6] It is apparent that the Third Circuit is throwing out the *Miller* standard as relating to the Web, not only from the above language, but also because "obscene" material was at issue along with the language of "harmful to minors."

[7] *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 117 S.Ct. 74 (1996), addressed the issue of community standards relative to the Internet and found that obscenity violations over the Internet could be prosecuted. Although the Court limited its holding to the specific facts of the case, i.e., where an operator of a bulletin board service knew where its

ACLU, 521 U.S. 844 at 878 n.44 (1997), where the Court unanimously upheld, as being constitutional on its face, Section 223(a)(1)(B)(ii) of the Communications Decency Act, which prohibits the transmission of "obscene" messages to any recipient the sender knows is under 18 years of age. In doing so, this Court specifically recognized that federal obscenity laws apply to the Internet when it stated:

> Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles.

The Third Circuit Court's belief, evidenced by its holding that obscenity laws must be geographic, caused it to incorrectly "find" that harmful to minors laws must also be geographic. As such, that Court misapplied the concept of community standards and came to a result which contradicts this Court's prior approval of the obscenity test as applied to the Internet. This Court should now correct the Third Circuit's error by properly finding that COPA's definition of harmful to minors is constitutional, since it uses a valid test. This Court has already sanctioned the applicability of obscenity laws for the Internet.

members were located through it's membership procedures, the Court properly applied the "contemporary community standard" measure of the test for obscenity found in *Miller*.

III. "HARMFUL TO MINORS" MATERIAL COMMUNICATED BY MEANS OF THE INTERNET INTRUDES INTO THE HOME AND IS READILY ACCESSIBLE TO CHILDREN. AS SUCH, IT CAN BE CONSIDERED A FORM OF "NUISANCE SPEECH" THAT NEED NOT MEET THE "COMMUNITY STANDARDS" PRONGS OF *MILLER* OR *GINSBERG*

There are narrowly limited classes of speech that are unprotected by the First Amendment. One such class is "nuisance speech." *Amici* submit that material that is "harmful to minors," which intrudes into the privacy of the home, and is readily accessible to children by way of the Internet, is a form of "nuisance."

The concept of "nuisance speech," as a class of speech unprotected by the First Amendment, was first "alluded to" by this Court in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where the Court stated at 571-572: [8]

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene... those which by their very utterance inflict injury or tend to incite an immediate breach of the peace... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The nuisance rationale was also applied by the three dissenting Justices in *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972). Justice Powell, with whom the Chief Justice and Justice Blackmun joined, wrote at 408 U.S. 905-906:

> But the exception to the First Amendment protection in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience... [A] verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the... subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance... The Model Penal Code... also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within...First Amendment [protection]. [Emphasis added.]

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[8] *Amici* use the phrase "alluded to" because the below quoted material from *Chaplinsky*, while not specifically mentioning nuisance speech, twice cites to *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does mention nuisance speech at pp. 149-150:

> But the law also punishes a few classes of words like obscenity, profanity... because the very utterance of such words is considered to inflict a present injury upon listeners, readers... [P]roperly limited they fall outside the protection of the free speech clauses... [P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see... The man who swears in a street car is as much of a nuisance as the man who smokes there. [Emphasis added.]

In *Breard v. Alexandria*, 341 U.S. 622 (1951) and *Kovacs v. Cooper*, 366 U.S. 77 (1949), this Court upheld nuisance ordinances aimed at means of communication that intrude into the privacy of the home. As the Court in *Kovacs* stated at 366 U.S. at 88-89:

> The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens for comfort and convenience. That more people may be more easily and cheaply reached by sound trucks... is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. [Emphasis added.]

In *Hess v. Indiana*, 414 U.S. 105, 107-108 (1973), this Court again identified speech that amounts to a public nuisance as being outside the protection of the First Amendment:

> It hardly needs repeating that "the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'" *Gooding v. Wilson, supra*, at 521-522... Hess' words could be punished as obscene... By the same token, any suggestion that Hess' speech amounted to "fighting words," *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), could not withstand scrutiny... In addition, there was no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded. [Emphasis added.]

See also Redrup v. New York, 386 U.S. 767, 769 (1967), (recognizing a need for government protection against an "assault upon individual privacy.")

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) this Court affirmed the FCC ruling that found the monologue, "Filthy Words," as broadcast, to be indecent and prohibited by 18 U.S.C. 1464. In so doing, the Court observed that the ruling "rested entirely on a nuisance rationale under which context is all-important." *Id.* at 750.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court held that a student could be penalized for making an indecent speech before a school assembly, attended by both students and faculty. Justice Stevens (dissenting on due process grounds) noted at 696:

> [A] nuisance may be merely a right thing in the wrong place -- like a pig in the parlor instead of the barnyard... Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others... It seems... obvious that [the] speech would be inappropriate in certain... settings.

Amici submit that material "harmful to minors" which, by means of the Internet, intrudes into the privacy of the home and is readily accessible to children is also "nuisance speech" which is unprotected by the First Amendment and which Congress can regulate, as it has chosen to do by enacting COPA to restrict children's access to material that is harmful as to them and which is readily available on the Internet.[9]

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[9] *See Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996), where Justice Breyer, writing for the Court, is critical of the absolutist approach of Justices Kennedy

and Thomas relative to regulation of leased access channels and says at 740:

> Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect. The history of the Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command... has been applied to new circumstances requiring different applications of prior principles and precedents... our cases have not left Congress or the States powerless to address the most serious problems (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); and *FCC v. Pacifica*, 438 U.S. 726 (1978)).

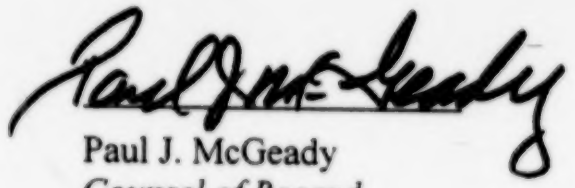
The Court continues at 740-743:

> Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application... This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems. This Court... has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.

CONCLUSION

For all of the aforementioned reasons, your *amici* pray that this Honorable Court reverse the judgment of the court below or in the alternative, remand for additional consideration and study.

Respectfully submitted,



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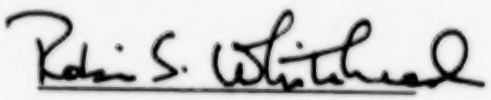

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